STATE OF MADHYA PRADESH. A

v.

DHIRENDRA KUMAR

NOVEMBER 5, 1996

[G.N. RAY AND B.L. HANSARIA, JJ.] B

Indian Penal Code, 1860: Section 302—Murder—Evidence of eye witnesses—Dying declaration recorded—Recovery of revolver—Omission in FIR of dying declaration—Effect of—Conviction by Trial Court—Acquittal by High Court—Held, FIRs are not taken as encyclopedia—Omission of dying declaration in FIR does not make it unbelievable— C *High Court not justified in acquitting the accused—Acquittal set aside.*

Death sentence—Not rarest of rare type—Acquittal set aside—Convicted for murder and sentenced to imprisonment for life.

Indian Evidence Act, 1872: Section 114 Illustration (a)—Held, it is D *permissible to presume that a person in possession of stolen goods soon after the theft is a thief.*

Judicial notice—Roznamcha not properly maintained—Prescribed registers not available—Case dairy not maintained—Judicial notice could E *be taken.*

One 'M' was killed by the respondent. The respondent was a tenant of PW-3 whose daughter-in-law was deceased 'M'. The deceased had reported to her mother-in-law, PW-2 that the respondent had an F **'evil eye' on her. The dying declaration of the deceased was recorded. But there was no mention about dying declaration in FIR. The revolver by which death has been caused was recovered from the respondent. The Rojnamcha had not properly maintained in the prescribed forms with pagination in it.**

G

The prosecution adduced evidence relating to motive of the crime, eye witness to the occurrence, dying declaration and recovery of the revolver.

The Trial Court convicted the respondent under s. 302 of the Indian Penal Code 1860 and awarded death sentence. On H

A appeal, the High Court acquitted the respondent. Hence, the present appeal.

Allowing the appeal, this Court

HELD: 1. The High Court while acquitting the accused has taken B a view which is unreasonable. Therefore, the acquittal is set aside. [451 A]

2. PW-2 had stated that she had spoken to her husband PW 3 on the very day 'M' told about the respondent having an 'evil eye' which was about 15 days before the occurrence, whereas the evidence C of PW 3 is that his wife had stated to him about this aspect 7-8 days before the occurrence. This little discrepancy is not enough to discard the otherwise consistent evidence on this point, especially when the statement made by PW 3 that he had asked the respondent to vacate the house, was not challenged in the cross-examination. The omission of PW-3 to tell during investigation that his wife had asked him to D get the house vacated is not enough to disbelieve PW-2 that she had asked her husband to do so. The findings of the High Court on this point is totally against the weight of evidence on record. [446 E-G]

3.1. The view taken by the High Court regarding the deceased being not in a position to make dying declaration was really perverse. E The evidence of PW-7, the Doctor was that the deceased, despite the injuries found on her person was in a position to speak for about 10-15 minutes. [447 F,G]

3.2. Merely because there is no mention in the FIR about the dying declaration, the evidence of PW-1 and PW-2 regarding dying F declaration cannot be discarded. Evidence of witnesses has to be tested on its own strength and weakness. It is a settled law that FIRs are not taken as encyclopedia and omission of a fact therein, even if material cannot by itself make the witness deposing about that fact unbelievable at that point. [448 E]

G

Ram Kumar v. *State of Madhya Pradesh,* [1975] SC 1024 held inapplicable.

5. The recovery of the revolver from the person of the respondent itself would bear the statement of PW-11 regarding the respondent H having stolen the revolver. Under illustration (a) to section 114 of

Evidence Act it is permissible to presume that if a man is in possession of stolen goods soon after the theft, he is the thief. [450 G,H]

6. The High Court disbelieved the prosecution since Rojnamcha had not been properly maintained with pagination in it. It was explained that since prescribed forms are not available, the Traffic Register was used as Roznamcha. Judicial notice can be taken of the fact that many a time prescribed registers are not available, and so, they are kept in non-prescribed way. Many a time even a case diary is not maintained in prescribed form. [450 E]

7. The present is not a case of 'rarest of the rare' type and respondent having enjoyed acquittal ever since the High Court's judgment, death sentence even if merited could not be imposed. Hence respondent is convicted under section 302 IPC and awarded the sentence of imprisonment for life. [451 B, D,E]

State of Haryana **v.** *Sher Singh,* **[1981] 2 SCC 300, relied on.**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No, 283 of 1984.

From the Judgment and Order dated 18.11.82 of the Madhya Pradesh High Court in Crl. A. No. 210 of 1982.

Sakesh Kumar for Uma Nath Singh for the Appellant.

S.K. Gambhir for the Respondent.

The Judgment of the Court was delivered by

HANSARIA, J. This appeal is by the State and is directed against the judgment of the Madhya Pradesh High Court by which the respondent was acquitted, on appeal being preferred by him against his conviction under section 302 for having caused the death of one Munibai on 20th May, 1982 around 9 a.m.

2. The prosecution sought to establish the guilt of the respondent by adducing evidence relating to the motive of the crime, eye-witness to the occurrence, dying declaration; and recovery of the revolver from the custody

A of the respondent by which death had been caused, which revolver had been stolen by the respondent, a police constable, from the Police Malkhana in the night of 19th-20th May, 1982. Though the trial court accepted all these facets of the prosecution case, the High Court disbelieved all.

3. We would examine the material on record qua each of the aforesaid B materials,

(i) Motive.

4. What led to the killing of Munibai had connection, according to the prosecution, with the respondent having an 'evil eye' on her. It may be C stated that the respondent was a tenant and was occupying a part of the house, in which landlord PW.3-Angad, was living, whose daughter—in—law was deceased Munibai. The family came to know about the respondent having an 'evil eye' from the deceased herself, which was reported by her to her mother-in-law PW.2—Kosabai. This was about 15 days before the occurrence. Kosabai in turn stated about this to her husband (PW.3), who D asked the respondent to vacate the premises.

5. Both PWs. 2 and 3 have categorically deposed about these facts. PW.2 had, however, stated that she had spoken to her husband on the very day Munibai told about the respondent having an 'evil eye', which was about 15 days before the occurrence, whereas the E evidence of PW.3 is that his wife had stated to him about this aspect 7-8 days before the occurrence. We do not think if this little discrepancy is enough to discard the otherwise consistent evidence on this point, especially when the statement made by PW.3 that he had asked the respondent to vacate the house has not challenged in cross-examination. We also do not think that omission of the PW.3 to tell during investigation F that his wife had asked him to get the house vacated is enough to disbelieve PW.2 that she had asked her husband to do so.

6. We are, therefore, of the view that the High Court's finding on this point is totally against the weight of evidence on record.

G

(ii) Eye witness.

7. PW.1- Radhabai, a daughter of PW.3 is the only witness to have deposed about the firing of shots by the respondent at the house in which the deceased was living. Her evidence as to the manner in which Munibai H was fired at finds absolute corroboration from the finding recorded by the

autopsy surgeon PW.7. The High Court, however, disbelieved PW.1 on two grounds. First, by referring to her evidence that when she saw the respondent firing shots, she had asked him as to why he was assaulting her bhabhi. To this the answer was "what has happened so far? I shall kill your whole family." After saying this, the accused had pressed the barrel of the pistol on her chest. By then the mother of the witness had arrived, so too a neighbour named Prakash Uncle Faddi Ram also came. The High Court has opined that if this was the position, PW.1's evidence that the respondent had left the premises without being caught cannot be accepted. Secondly, the High Court was of the view that the evidence of PW.1 about the deceased having made any dying declaration cannot be accepted, because the deceased was really not in a position to make any statement.

8. Shri Gambhir has strenuously urged that the High Court's assessment of the evidence of PW.1 is absolutely reasonable and, in any case, that view being also possible, we may not find fault with the High Court's judgment so much so as to set aside the acquittal.

9. We are, however, of the view that even if it be accepted that the mother, the neighbour and uncle had arrived before the respondent had left the house, but as he was then armed with a revolver and had made his way through the chhajja by passing through the portico, as stated by PW.1, the failure of these persons to apprehend the respondent cannot cause any dent to the evidence of PW.1. The respondent having threatened to kill the whole family, nobody could have risked his life to apprehend such a desperate character.

(iii) Dying declaration.

10. Insofar as dying declaration is concerned, we find that the evidence of PW.7 (Dr. Badkul) is that the deceased, despite the injuries found on her person, was in a position to speak for about 10-15 minutes of the assaults on her. As the mother-in-law was in the ground floor and had immediately come hearing cries, time taken could not have been more 5-6 minutes. Therefore, the view taken by the High Court regarding the deceased being not in a position to make dying declaration was really perverse.

11. It was very emphatically contended by Shri Gambhir that as in the First Information Report (FIR) there is no mention about the dying declaration, we should discard the evidence of PWs. 1 and 2 regarding

A dying declaration, because of what has been pointed out by this Court in *Ram Kumar* v. *State of Madhya Pradesh,* AIR (1975) SC 1024. We do not, however, agree with Shri Gambhir, for the reason that what was observed in *Ram Kumar's case*, after noting the broad facts, was that material omission in the FIR would cast doubt on the veracity of the prosecution case, despite the general law being that statements made in the FIR can be B used to corroborate or contradict its maker. This view owes its origin to the thinking that if there be material departure in the prosecution case as unfolded in the FIR, which would so if material facts not mentioned in the FIR are deposed to by prosecution witnesses in the court, the same would cause dent to the edifice on which the prosecution case is built, as the substratum of the prosecution case then gets altered. It is apparent that C prosecution cannot project two entirely different versions of a case. This is entirely different from thinking that some omission in the FIR would require disbelieving of the witnesses who depose about the fact not mentioned in the FIR. Evidence of witnesses has to be tested on its own strength or weakness. While doing so, if the fact deposed be a material part of prosecution case, about which, however, no mention was made in D the FIR, the same would be borne in mind while deciding about the credibility of the evidence given by the witness in question.

12. We, therefore, do not agree with Shri Gambhir that *Ram Kumar's case* would require us to disbelieve the evidence of PWs. 1 and 2 regarding E dying declaration of the deceased, only because the FIR has not mentioned about it. It is a settled law that FIRs are not taken as encyclopedia and omission of a fact therein, even if material, cannot by itself make the witness deposing about that fact unbelievable at that point.

13. PW.1 was thus not a witness to have been disbelieved on the two F aforesaid grounds. Her evidence finds corroboration, as already mentioned, from the findings of the autopsy surgeon. This apart, her evidence the respondent had killed Munibai by firing has also received corroboration from the recovery of a revolver from the possession of the respondent, to which aspect we shall advert later, supplemented by ballistic expert's report G that very revolver had been used is firing at Munibai.

(iv) Recovery of revolver.

14. As to the recovery of the revolver, Shri Gambhir's very strenuous submission was that we may not accept this inasmuch as out of two witnesses H examined on this point, PW.6—Santoshilal, did not support the prosecution.

It is no doubt correct that PW.6 had to be declared hostile, but he is a witness who has destroyed his own veracity because, though he stated in examination—in-chief that his blank signatures were taken on some papers by calling him to the police station when he was passing by the road, in cross-examination the version given was that the signatures had been taken when he had come to the police station to do hair cut—he being a barber by profession. These two statements definitely cannot stand together. This apart, it is difficult to believe that PW.6 would have actually given his signatures on blank papers, without making any complaint about the same to anybody. The hostility of PW.6 has, therefore, caused no damage to the prosecution case relating to recovery, about which there is the confidence inspiring evidence of PW.10.

15. Shri Gambhir has made effort, and strenuous effort at that to persuade us to hold that the prosecution case that the respondent had stolen the revolver from the Police Malkhana is unbelievable. This aspect had, however, come to be accepted by the trial court because of the evidence of PW.11, who was the Head Constable and was the in-charge of the Malkhana. His evidence is that as nobody can perform duty all the 24 hours, practice has been that in the night keys of Malkhana are entrusted to Constable Muharrir, as was the respondent. He has deposed that on the night intervening 19 and 20 May, respondent was detailed in the night, which aspect is mentioned in the Rojnamcha. Thereafter, the witness left to his house around 10. p.m. and returned back next day morning at about 8.30 am. The respondent then handed over the keys. On this being done, the witness desired that the repondent could go after checking the Malkhana. The respondent said that he would come back within five minutes after taking tea and the checking could be done thereafter. As the respondent did not return, Malkhana was opened and PW.11 found that one revolver of. 455 bore was missing. This was immediately brought to the notice of the Station House Officer. The reporting was by Ex. 11-C and was around 8.40 a.m. In this exhibit the substances of the aforesaid evidence finds place and the number of the revolver has also been mentioned, which is 356354. It is the revolver bearing this number which was subsequently recovered from the respondent on 20th May itself around 11.30 a.m. This fast movement was because, after receiving the information of missing of the revolver, the Station House Officer went to the place where respondent was residing which, as already noted, was a part of the house it which Munibhai was residing. Going there, the Station House Officer knew about the killing and this led to the search of the respondent, about whom PW.1 had stated that he had left towards the field.

16. Despite the aforesaid evidence being on record, Shri Gambhir

A has urged that the prosecution case relating to stealing was rightly disbelieved by the High Court because the rules did not permit giving of Malkhana key to anybody else. Though this is correct, but then as deposed by PW.11 a practice to that effect had grown, which came to be adopted because of the physical impossibility of any body to be at the Police Station throughout 24 hours. It may be pointed out that when PW.11 deposed about this B practice, he was not challenged in cross-examination.

17. Yet another connection made in this regard by Shri Gambhir what that as a departmental proceeding against PW.11 is pending regarding this very aspect, the same shows that even, according to the authorities, PW.11 might have been responsible for stealing the revolver. As the charge C framed in the departmental proceeding is not available to us, we do not know what precisely has been alleged against PW.11. It may be that the allegation is that he allowed the stealing to take place. As, however, the proceeding is said to be pending, we would observe that whatever we have held in this case relating to stealing of revolver would not be used by PW.11 in the proceeding to demand his exoneration from the charge as D framed against him.

18. The second reason given by the High Court to disbelieve this part of prosecution is that the Rojnamcha had not been properly maintained, as there was no pagination in it. PW.11 gave valid explanation for this— E the same being that prescribed forms being not available, the Traffic Register was used as Rojnamcha. Judicial notice can be taken of the fact that many a time prescribed registers are not available, and so, they are kept in non-prescribed way. Many a time even a Case Diary is not maintained in prescribed form.

F 19. Shri Gambhir then referred to the omission in Ex. P.11-C about the respondent's statement to PW.11 in the morning of 20th that he would come back after taking tea, as deposed by PW.11 in court. We do not think if this omission can throw any doubt on the very prompt report about missing of the revolver and about Malkhana key having been given to the G respondent on the night of 19th May. In Ex. P.11 it was mentioned that the Head Constable suspected that the respondent had stolen the revolver. The recovery of that revolver from the person of the respondent on 20th May itself would bear the statement of PW.11 regarding the respondent having had been stolen the revolver. It may be pointed about that under Illustration (a) to section 114 of Evidence Act, it is permissible to presume that if a H man is in possession of stolen goods soon after the theft, he is the thief.

20. The aforesaid being the position regarding the materials brought on record by the prosecution to bring home the guilt of the respondent we are of the firm opinion that the High Court has taken a view which cannot be called reasonable at all. The law, therefore, permits this Court to set aside the acquittal, which we hereby do.

21. This leaves for consideration the question of sentence. The trial court had awarded the death sentence; but we would refrain from doing so for two reasons : (1) the present is not a case of 'rarest of the rare' type; and (2) the respondent having enjoyed acquittal ever since High Court's judgment dated 19.11.1982, death sentence, even if it would have been merited, would not have been imposed by us. We may refer in this context in the decision of this Court in *State of Haryana* v. *Sher Singh,* [1981] 2 SCC 300, to which our attention has invited by Shri Gambhir. In that case it has been stated in para 21 that despite the murder being ghastly and brutal deserving death sentence, as awarded by the Sessions Judge, the same was not being awarded because of the acquittal enjoyed by the convict after High Court's judgment.

21. The impugned judgment is, therefore, set aside and we convict the respondent under section 302, for which offence we award the sentence of imprisonment for life. The respondent is on bail; his bail bonds are cancelled. He would be taken in custody to serve out the sentence.

S.V.K.I. Appeal allowed.